THE SHERMAN ACT AND THE WAR.

On April 12, 1917, an indictment was filed in the United States District Court for the Southern District of New York against a number of men, the charge against whom was that they had entered into an unlawful combination in restraint of trade in that they controlled the newspaper print industry. It was charged that the great bulk of the output of newsprint paper in this country was produced by some forty corporations which were members of an association of newsprint manufacturers; that the defendants dominated this association and its member corporations; that they controlled trade and commerce in newsprint paper, restraining competition in securing customers, in quality of paper, in delivery and storage of paper, in terms of credit and various other matters. The indictment, in short, charged many of the typical acts held by the courts to constitute violations of our anti-trust laws.

On November 26, 1917, the case came up before the United States District Court, Judge Julius M. Mayer presiding. Most of the defendants pleaded *nolle contendere*. The plea was accepted by the court on the consent of the government, and the defendants were thereupon fined. Their pleas and their fines are matters of no great importance. But there were at the same time submitted to Judge Mayer a petition and an agreement upon which he made a final decree. In these three documents,—brief, lucid, phrased as simply as if they dealt with familiar and well-tried matter,—will, it is believed, be found a novel and significant contribution to the jurisprudence of this country.

The Agreement.

The parties to the agreement are Thomas W. Gregory, the Attorney-General of the United States, and the newsprint paper manufacturers. Mr. Gregory makes the contract as trustee on behalf of publishers who use newsprint paper,—which is to say that the attorney-general assumes to act as trustee for all the newspaper publishers of the United States. After reciting the desirability of an adjustment of trade conditions in the newsprint industry, the agreement provides that the newsprint manufacturers will consent to a decree dissolving the Newsprint Manufacturers' Association as an unlawful combination, and it provides for

maximum prices for newsprint paper up to April 1, 1918, and that thereafter (here we come to the essence of the matter)

> "the just and reasonable maximum prices and terms of contract for the sale of all or any newsprint paper shall be determined and fixed by the Federal Trade Commission".

It provides for review of the findings of the commission by the circuit court judges of the second circuit. It provides that the maximum prices and terms of contract so determined shall continue until three months after the end of the war. The newsprint manufacturers agree to offer their newsprint paper for sale in accordance with the maximum prices so fixed.

The Petition.

The government's petition alleges the existence of the combination, largely as it is described in the indictment, and prays for a decree that the Newsprint Manufacturers' Association be adjudged an unlawful combination in restraint of trade and dissolved; and that the various member corporations be enjoined from carrying the combination into further effect, but that the member corporations shall not be enjoined from entering into the agreement just described.

In effect, this petition is a bill of complaint in equity in a suit of the United States of America against the individual defendants who had been indicted, the association and its member corporations, brought for the purpose of dissolving the association as a combination in restraint of trade.

The Decree.

The decree, entered by consent, adjudges the combination illegal, dissolves it, enjoins any further acts looking toward carrying it into effect, and, continuing, contains the following pregnant clause:

> "Nothing herein contained shall prevent the defendants from entering into and performing a certain contract of even date with the Attorney-General of the United States as Trustee, made for the purpose of meeting the emergencies created by existing conditions and by the present state of war in the United States."

In brief, then, the newsprint case is that of a combination adjudged illegal and dissolved under an arrangement made by the government with the defendants and approved by the court, whereby power is conferred upon the Federal Trade Commission to fix maximum prices.

Are the import and effect of this disposition of the case apparent? Does the reader recognize that in this method of dealing with the newsprint trust the Sherman Act has been harnessed to economic needs; that controlling groups in any line of industry have had the door opened to them for that decent and wholesome co-operative action which to this time has been forbidden them? Let us see the effect of the proceedings of November 26.

The Federal Trade Commission, a body without statutory power to fix prices, whether maximum or minimum, has, by consent of the government and the newsprint industry, had conferred upon it the power to fix the maximum prices of newsprint paper. This power has been acquired by voluntary agreement, stimulated possibly by the fact of an indictment. In making this agreement the attorney-general has acted, not as an officer of the government, but as a self-constituted trustee and guardian for the American newspaper publishers. The agreement has provided for review of the actions of the Federal Trade Commission by the circuit court judges of the second circuit, but if they entertain such review, they will be acting in an extra-judicial capacity,—practically as arbitrators (having, as the writer is informed, consented so to act).

Thus, a number of gentlemen who compose a body called the Federal Trade Commission will be acting extra-officially to fix maximum prices, pursuant to an agreement (approved by the court) between a gentleman (acting extra-officially) who happens to be Attorney-General of the United States, and the manufacturers of newsprint papers; and various other gentlemen who happen to be the circuit court judges will (extra-judicially) have power as arbitrators to review the actions of the Federal Trade Commission.

It will not serve the purpose of, nor is it needful to, this brief essay to enter into a discussion of the cases in which our judges have fought about the meaning, effect and extent of the Sherman Act. The many cross-currents, the conflicting views, the dissents, the confusion, doubt and contradictions on the subject are well known to the Bar. Any lawyer who has read such cases as the

Trans-Missouri Freight Association case,[1] The Joint Traffic Association case,[2] the Addyston Pipe Line case,[3] and the Standard Oil[4] and Tobacco[5] cases, and the case of *Dr. Miles Medical Co.* v. *Park & Sons*,[6] can, without much of an effort of imagination, picture the ardent arguments which must have occurred in the conference room of the Supreme Court while these cases were in the throes of decision. The language of some of the dissenting opinions gives some indication of the violence of the difference among our Supreme Court Judges on the economic questions involved. For example, in the case of Miles Medical Company, the dissenting opinion of that learned jurist, Mr. Justice Holmes, points out that

> "the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear".[7]

Considering the effect of interference, he remarks:

> "Of course, it is not in the interest of the producer. No one, I judge, cares for that. * * * Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition".[8]

It is interesting to note that following this able dissenting opinion, delivered in 1911, the Standard Oil and Tobacco cases, decided at the same term of court, laid down the famed "rule of reason", with its consequent substantial measure of protection to the producer, whose rights had theretofore been considered as negligible. Whether or not the Supreme Court reversed its earlier rulings in the Standard Oil and Tobacco cases is beside the mark, but one cannot pass them by without reference to Mr. Justice Harlan's colorful dissent in the Tobacco case and his remark that the statement in the prevailing opinion in the Standard Oil

[1]United States *v.* Trans-Missouri Freight Ass'n. (1897) 166 U. S. 290, 17 Sup. Ct. 540.

[2]United States *v.* Joint Traffic Ass'n. (1898) 171 U. S. 505, 19 Sup. Ct. 25.

[3]Addyston Pipe & Steel Co. *v.* United States (1899) 175 U. S. 211, 20 Sup. Ct. 96.

[4]Standard Oil Co. *v.* United States (1911) 221 U. S. 1, 31 Sup. Ct. 502.

[5]United States *v.* American Tobacco Co. (1911) 221 U. S. 106, 31 Sup. Ct. 632.

[6](1911) 220 U. S. 373, 31 Sup. Ct. 376.

[7]At p. 411.

[8]At pp. 411-412.

case to the effect that that decision was in accordance with previous decisions surprised him

> "quite as much as would a statement that black was white or white was black".[9]

These few observations are perhaps interesting as showing how the development of the construction of the anti-trust laws has been a fitting prelude to the newsprint decree. Yet, despite the undoubted effect of economic conditions upon the judgments of the United States Supreme Court, the last word which that tribunal has to the present time spoken on the subject is announced in the case of *Thomsen* v. *Cayser*[10] wherein the Court says

> "that a combination is not excused because it was induced by good motives or produced good results".

Whatever else, then, the cases may announce, the result of the conflict between commerce and the courts, as it is written in the decisions of the United States Supreme Court, seems clearly to be that a combination by controlling factors in a given industry, however laudable in intent and beneficial in operation, comes under the ban of the statute; whether such a combination is made to save its participants from ruin through excessive competition, reasonably to limit output so as to avoid the waste of excessive supply, to co-ordinate trade necessities, or for any other purpose or reasons, the combination is unlawful and those who enter into it run afoul of the criminal law. Co-operative action,—friendly agreement on trade usages or needs,—has thus in many cases been thwarted and stifled, and, in others, the stress of economic conditions has led to secret combinations as to price, output, credit, and so forth, or to resort by subterfuge to sales agencies, trade discounts, rebates, *etc.*

The newsprint decree for the first time, it is believed, offers something approaching a solution for these problems which have so beset all honest groups controlling any branch of commerce. It suggests to them that they confer with the Department of Justice, frankly lay before it their trade necessities, enter into an agreement whereby the co-operative measures they require may be submitted to a federal commission, and whereby such a body may fix maximum prices; for, now that the attorney-general has with the court's approval once taken such a course, the path has been shown to others.

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[9] 221 U. S., at p. 191.

[10] (1917) 243 U. S. 66, at p. 86, 37 Sup. Ct. 353.

Whether the play of competition should be wholly free and unrestrained, whether combinations "in restraint of trade" are at times desirable, whether the government ought itself at times to restrain trade,—these are big questions for the economist. With these questions the writer is not here dealing. Yet, in commenting on the newsprint decree and considering its possibly far-reaching effects, one cannot but note how it voices the tendencies of the time. The Interstate Commerce Commission controls railroad rates, or did when these lines were written; now they are in effect in the hands of a supreme director—restraint of competition in very truth. Thus competition among the railroads is restrained. The President has, by taking over the railroads, given point to the urgent need of combination, concentration and co-ordination. The President, under one of the recent war measures,[11] fixed the price of coal last August,—not a restraint merely, but a destruction of price competition. The President has lately recommended legislation to permit combinations in relation to foreign trade. Pooling agreements by the eastern railroads have lately been in force; competition in important food-stuffs is curtailed or forbidden; "maximum prices" and "minimum wages" are on everyone's lips. The catch-word is no longer "competition". The words which now fire the imagination are "co-operation", "co-ordination". And beneath and behind these words lie deep meanings and urgent war needs.

Is it too much, then, to say that to the counsel who prepared the newsprint documents and to the court which signed the newsprint decree belongs the credit of a great piece of constructive work? Legalistic conservatives may decry it. They may object to Mr. Gregory's voluntary trusteeship, to the acquisition of great extra-official powers by the Federal Trade Commission, and to a decree which sanctioned such an arrangement. But during the war, at least, there must be an armistice in the battle of commerce against the Department of Justice and the courts. The newsprint decree flies such a flag of truce. But it does more than that; for, as it is quite in line with a scheme of governmental price-fixing of staple commodities, of governmental control over industry, of enforced co-operation, of an end to competition in large industrial enterprise, so it suggests a practical method whereby the government and the trusts can meet on common ground.

Such schemes are today not only widely pondered and discussed; they have passed from the economist's study to the wide field of actual business life.

[11]The Lever Act, H. R. 4961, 65th Congress, 1st Session.

The Chamber of Commerce of the United States is deliberating upon recommending extensive price-fixing legislation. Congress is likely to take up the matter at an early date. Should that happen, the newsprint decree suggests an admirable scheme of legislation,—a scheme whereunder the Federal Trade Commission shall have elastic powers with provision for review by the courts. And, while so tremendous a piece of legislation as this goes through its slow period of gestation, the newsprint decree furnishes a means of co-operation and co-ordination between the government and the trusts, and illustrates vividly how court and counsel, alive to the urgent requirements of these thrilling days, have been able to bend to present needs the iron of a statute heretofore rigid and unadaptable to economic growth.

Whether we like it or not, we find that the pressure of war and the growing demands of that vast, self-conscious and magnificently organized power,—labor,—are breaking down individualistic concepts of a government which permits unrestricted competition; we find the government consenting to postpone anti-trust prosecutions; whether or not it suits our political or economic views, we find an increasing governmental supervision over industry, particularly over great industry of interstate and international character,—an increasing demand for combined, concentrated and co-ordinated action in manufacture and trade. The need of supervision, in war time particularly, requires no argument, and the need of the future period of reconstruction is equally plain. The danger, with such currents sweeping through the land, is that government will go too far; that it will attempt to fix prices and regulate production of everything from steel bars to bird cages, from coal to candy. Trade in specialized articles cannot, it is believed, be successfully controlled. Raw products, staple commodities or necessities,—these are things over which the government must, and, in view of the world war, will increasingly extend its powerful arm. The newsprint decree has the extraordinary merit of affording a simple and workable method of accomplishing such results at once in relation to the great branches of trade and manufacture; and of doing so in a sensible way, guided by the "rule of reason". While it does not afford complete relief, since it could not have been made excepting through the consent of the newsprint industry, yet the decree is for practical purposes adequate, since it opens the door for the controlling interests in any line of industry to agree on the fixing of a fair maximum price with governmental sanction.

The discussion of the newsprint decree would be incomplete without a consideration of the question of the court's power to make it. That power, it is believed, is found amply in the supervisory jurisdiction of the federal court over the details and manner of dissolution of illegal combinations.

Thus, it was declared in *United States* v. *Union Pacific R. R.*[12] that the object of proceedings of this character is to decree, "by as effectual means as a court may, the end of such unlawful combinations". In line with this statement of the Supreme Court, various methods for working out the details of dissolution have been adopted by the courts. In the Tobacco and Standard Oil cases[13] the Supreme Court remanded the causes to the circuit court, instructing it to formulate and carry out the details of dissolution; from which it will be observed that the courts have not contented themselves simply with an injunction order, but have gone much further in order to make effective their decrees of dissolution.

In the newsprint case the court found that the "most effectual means" for dissolving the combination was to let the Federal Trade Commission fix maximum prices. In permitting this body to act in this capacity, the court, instead of trying itself to work out a purely administrative duty, selected for that purpose a body having ample administrative offices and equipment for that very purpose. Novel as is the disposition of the case, the court's power to take the step in order to render its decree effectual can no more be doubted than its wisdom in delegating to an administrative body a purely administrative function.

The Federal Trade Commission was formed, as the statute creating it shows, for the purpose of creating an administrative body clothed with powers to investigate combinations so as to prevent their continuance and so as to make the anti-trust laws effective. In the case of *United States* v. *Corn Products Refining Company*,[14] Judge Learned Hand referred the details of dissolution to the Federal Trade Commission as master in chancery instructing it to present a plan for dissolution to the district court. He pointed out that

> "in all cases where the history of the combination has been such as this, the Supreme Court has declined to rest upon injunctions alone".[15]

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[12](1913) 226 U. S. 470, at p. 477, 33 Sup. Ct. 162.
[13]*Supra*, footnotes 4, 5.
[14](D. C. 1916) 234 Fed. 964.
[15]At p. 1018.

Judge Hand's action was taken pursuant to the act creating the Federal Trade Commission, which authorizes the court in suits brought by the government under the anti-trust laws to

> "refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree".[16]

Judge Rose, in the District of Maryland, in a recent case, found an unlawful combination to exist but refused to dissolve it, saying:

> "The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal. * * * * *
>
> The creative faculty of equity still continues to be energetic and productive".[17]

It was in the exercise of these creative faculties ever adaptable to the varied needs of life that the court had full jurisdiction to make the newsprint decree, and an instance of a somewhat similar theory of action is found in the Equity Rules in the United States District Court for the Southern District of New York[18] providing that in patent causes the court will, upon consent of the parties, appoint an expert as an assessor, such assessor to sit with the judge in the hearing of the evidence and assist the court in its deliberations.

In other words then, just as the court has, in the newsprint case, called in an expert body, so the court in patent cases calls in an expert body to advise it, rather than to decide haphazard, subjected as it is to the limitations which surround a court.

Since the court has power to appoint the Federal Trade Commission as special master even without the consent of a defendant, *a fortiori,* the court's power to authorize the Federal Trade Commission to fix maximum prices when that authorization is consented to by the defendants, as in the newsprint case, cannot be questioned.

Several years ago Judge Walter C. Noyes, sitting in the circuit court of appeals in the second circuit, explaining the constantly

[16]38 Stat. 722, 8 U. S. Comp. Stat. (1916) § 8836*g*.

[17]United States *v.* American Can Co. (D. C. 1916) 234 Fed. 1019, at pp. 1021, 1022.

[18]Rule 6.

increasing scope of jurisdiction of the federal courts in equity insolvency suits, remarked:

> "Thus is illustrated anew the vainness of saying what courts of equity *cannot* do."[19]

These words are appropriate to the newsprint decree. Heretofore details of dissolution have been prepared by counsel for the government and the defendants, and have then been submitted to the court. In this respect the newsprint decree is an innovation, for here the court has delegated the crucial matter of maximum price to the Federal Trade Commission. The advantages of this plan over former methods are too obvious to require discussion. Courts are judicial, not economic bodies. Judges have neither the time nor the administrative and clerical staffs with which to deal with the purely business questions of details and manner of dissolution. Moreover, the newsprint decree has the advantage of elasticity. Prices can be changed from time to time by the Federal Trade Commission and, above all, there is a constant supervisory arm over the newsprint trade. In other cases, once the final decree of dissolution was made, the court ceased to follow the subsequent history of business conduct of the defendants, for the court had no agency to carry out such a program, and it may, therefore, be questioned whether such decrees have been effective. The newsprint decree, on the contrary, causes an unceasing supervision over the newsprint trade so that there will be a constant protection of the interests of the public.

It is, therefore, a most "effectual means" for dissolving a trust and instances not only a valid but also a wise and far-seeing use of those broad powers of chancery to exert which courts of equity came into being.

While it is true that the proceedings in the newsprint case are on their face a war measure merely (for the powers of the Federal Trade Commission over prices of newsprint cease three months after the end of the war), and while the case can be regarded as a precedent for action by the attorney-general only, perhaps, where a combination otherwise illegal is to be dealt with by voluntary arrangement, there seems to be no good reason why the same plan should not afford a basis for like judicial action in other branches of commerce, and for a scheme of legislation hereafter.

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[19]Pennsylvania Steel Co. *v.* New York City Ry. (C. C. A. 1912) 198 Fed. 721, at p. 737.